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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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| 09/890,696 | 12/16/2001 | Michael Brock | MULLER-27 | 6217 |

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EXAMINER

WANG, SHENGJUN

ART UNIT PAPER NUMBER

1617

DATE MAILED: 04/12/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

| | | | |
|------------------------------|--------------------------------------|-------------------------------------|--|
| Office Action Summary | Application No. 09/890,696 | Applicant(s) BROCK ET AL. | |
| | Examiner Shengjun Wang | Art Unit 1617 | |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 02 February 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 11-17 and 20 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 11-17,20 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on February 2, 2006 has been entered.

Claim Rejections 35 U.S.C. 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 11-17, and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lerg et al. (US 6,132,738, IDS) in view of Balzer (US 5,605,651) and Bergmann et al. (US 5,077,040), in further view of Ansmann et al. (EP 771,559), Scholz et al (DE 3534733, IDS) and applicants' admission

3. Lerg et al. teaches a cosmetic cleansing composition for shower comprising fatty alcohol ether sulfate alkanolammonium salt, or fatty alcohol sulfate alkanolammonium salt; an oil component, which may be triglycerides; a low alky alcohol, such as propylene glycol, and other well known cosmetic additives, including surfactant. See, particularly, the examples in columns 7 and 8. and the claims. Lerg et al. further teaches that it is considered within the skill of artisan to formulate various forms of oil containing composition, including oil-in-water emulsion, by using proper surfactant. See, particularly, column 1, lines 35-47. Lerg et al. point out that artisan

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is motivated to make concentrated form simply because concentrated form are convenient (compared to diluted, which would require large amounts when used). See, col. 2, lines 1-6.

4. Lerg et al. does not teach expressly a diluted form, i.e., with substantially amount of water, and in the form of microemulsion.

5. However, Balzer teaches that fatty alcohol ether sulfate alkanolammonium salt, or fatty alcohol sulfate alkanolammonium salt, are known to be an emulsifier, particularly, in cosmetic or pharmaceutical composition containing oil components. Bergmann et al. teaches that fatty alcohol ether sulfate alkanolammonium salt are known to be useful in cosmetic microemulsion compositions as surfactant. See, particularly, column 18, lines 34-60. Ansmann et al. disclose that diluted cosmetic or pharmaceutical emulsion with alkenyl(ether) sulphate (including alkanolamino salt) is known in the art. See, particularly pages 2-3 and the examples therein.

Applicants admit "Microemulsions containing alkylpolyalkyleneglycolether-sulfates or alkylsulfates are known per se. DE 35 34 733 A1 discloses foaming surfactant preparations with clear-solubilized, water-insoluble oil components, which are usually termed microemulsions." (page 4, line 20-24 of the specification). DE 35 34 733 A1 discloses composition contains (A) 0.05-3wt.% of a clear solubilised, water insoluble oil, fat or wax, (B) 0.5-30% of a non-ionic polyoxyethylated emulsifier, (C) 10-30% of an anionic sulph(on)ate surfactant, (D) 0-10% of an amphoteric and/or hybrid ionic and/or amine oxide surfactant, and (E) 40-80% of water. (see page 1).

6. Therefore, it would have been prima facie obvious to a person of ordinary skill in the art, at the time the claimed the invention was made, to dilute the composition of Lerg et al. with water and formulate the composition into microemulsion form accordingly.

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7. A person of ordinary skill in the art would have been motivated to dilute the composition of Lerg et al. with water and formulate the composition into microemulsion form because fatty alcohol ether sulfate alkanolammonium salts, or fatty alcohol sulfate alkanolammonium salts are known to be useful as emulsifier, and are particularly useful in microemulsion cosmetic composition. It is noted that diluted cosmetic or pharmaceutical emulsion with alkenyl(ether) sulphate (including alkanolamino salt) is known in the art. Furthermore, the optimization of a result effective parameter, e.g., particularly surfactant, or the amounts of each and every ingredient, is considered within the skill of the artisan. See, In re Boesch and Slaney (CCPA) 204 USPQ 215. With respect to hydroxylisopropyl as R4, note Lerg disclose ammonium salt wherein Rs may be hydroxyl alkyl radical having from 1-24 carbon (column 2, lines 55-67), and Balzer particularly teaches the ammonium salt of fatty alcohol sulfate with C2-C3 alkanolammonium (column 3, lines 54-60). Further, a known or obvious composition does not become patentable simply because it has been described as somewhat inferior to some other product for the same use." In re Gurley, 27 F.3d 551, 554, 31 USPQ2d 1130, 1132 (Fed. Cir. 1994). A diluted forms of a known cosmetic or pharmaceutical composition, even though known to be inferior (for its inconvenience), is deemed obvious to its concentrated form, and is not patentable distinct from the known concentrated form. As to claim 20 which recites "constisting essentially of", note Lerg et al. do not require other ingredient as the essential material in the composition.

8. Claims 11-17 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hermann et al. (US 4,371,548, IDS) in view of Balzer (US 5,605,651) and Bergmann et al. (US 5,077,040), and in further view of Ansmann et al. (EP 771,559).

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9. Hermann et al. teaches a cosmetic cleansing composition for shower comprising fatty alcohol ether sulfate, or fatty alcohol sulfate; and polyalkanolamine, such as isopropanolamine or diisopropanolamine; an oil component, which may be triglycerides; a low alky alcohol, such as propylene glycol, and other well known cosmetic additives, including surfactant. See, particularly, column 1, line 35 bridging column 2, line 24, the examples in columns 3 and 4, and the claims.

10. Hermann et al. does not teach expressly a diluted form, i.e., with substantially amount of water, and in the form of microemulsion.

11. However, Balzer teaches that fatty alcohol ether sulfate alkanolammonium salt, or fatty alcohol sulfate alkanolammonium salt, are known to be an emulsifier, particularly, in cosmetic or pharmaceutical composition containing oil components. Bergmann et al. teaches that fatty alcohol ether sulfate alkanolammonium salt are known to be useful in cosmetic microemulsion compositions as surfactant. See, particularly, column 18, lines 34-60. Ansmann et al. disclose that diluted cosmetic or pharmaceutical emulsion with alkenyl(ether) sulphate (including alkanolamino salt) is known in the art. See, particularly pages 2-3 and the examples therein. Applicants admit that "Microemulsions containing alkylpolyalkyleneglycoether-sulfates or alkylsulfates are known per se. DE 35 34 733 A1 discloses foaming surfactant preparations with clear-solubilized, water-insoluble oil components, which are usually termed microemulsions." (page 4, line 20-24 of the specification). DE 35 34 733 A1 discloses composition contains (A) 0.05-3wt.% of a clear solubilised, water insoluble oil, fat or wax, (B) 0.5-30% of a non-ionic polyoxyethylated emulsifier, (C) 10-30% of an anionic sulph(on)ate surfactant, (D) 0-10% of an

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amphoteric and/or hybrid ionic and/or amine oxide surfactant, and (E) 40-80% of water. (see page 1).

Therefore, it would have been prima facie obvious to a person of ordinary skill in the art, at the time the claimed the invention was made, to dilute the composition of Hermann et al. with water and formulate the composition into microemulsion form accordingly.

12. A person of ordinary skill in the art would have been motivated to dilute the composition of Lerg et al. with water and formulate the composition into microemulsion form because fatty alcohol ether sulfate alkanolammonium salts, or fatty alcohol sulfate alkanolammonium salts are known to be useful as emulsifier, and are particularly useful in microemulsion cosmetic composition. Further, it is noted that diluted cosmetic or pharmaceutical emulsion with alkenyl(ether) sulphate (including alkanolamino salt) is known in the art. Furthermore, the optimization of a result effective parameter, e.g., particularly surfactant, or the amounts of each and every ingredient, is considered within the skill of the artisan. See, In re Boesch and Slaney (CCPA) 204 USPQ 215. With respect to hydroxylisopropyl as R4, note Hermann disclose the amine moiety of the ammonium salt may be isopropanolamine, mixed alkanolalkylamines, and Balzer particularly teaches the ammonium salt of fatty alcohol sulfate with C2-C3 alkanolammonium. A known or obvious composition does not become patentable simply because it has been described as somewhat inferior to some other product for the same use." In re Gurley, 27 F.3d 551, 554, 31 USPQ2d 1130, 1132 (Fed. Cir. 1994). A diluted forms of a known cosmetic or pharmaceutical composition, even though known to be inferior (for its inconvenience), is deemed obvious to its concentrated form, and is not patentable distinct from

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the known concentrated form. As to claim 20, which recites "consisting essentially of", note Hermann et al. do not require other ingredient as the essential material in the composition.

Response to the Arguments

Applicants' amendments and remarks submitted February 2, 2006 have been fully considered, but are not persuasive.

13. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Particularly, the primary reference teaches essentially an identical composition, except for the concentration (the amount of water) and the droplet size (microemulsion). Note the "emulsion" as disclosed by the primary reference would encompass both macroemulsions and microemulsions. The secondary references provide evidences and directions that alkylpolyalkyleneglycolether-sulfates would form microemulsion with the presence of other surfactants, as suggested by the primary references.

14. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

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15. Applicants further contend that the cited references fails to establish a prima facie case of obviousness for the claimed invention since the references merely provide motivation for “obvious to try”. The examiner found the arguments not probative. The arguments blankly assert the references only provide motivation for “obvious to try”, and without elaborating the features, properties, and/or structures of the claimed invention, which are unobvious and/or unpredictable to one of ordinary skill in the art, and which can only achieved by a process of try and error. Nor has the examiner found any of such features, properties, and/or structures in the claimed invention.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Shengjun Wang whose telephone number is (571) 272-0632. The examiner can normally be reached on Monday to Friday from 7:00 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan, can be reached on (571) 272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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